

No.

97

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943

FLETCHER TRUST COMPANY, TRUSTEES AND TRANSFEREES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT
OF SAID PETITION.**

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-
PORT OF SAID PETITION.**

PETITION.

Fletcher Trust Company, Trustees and Transferees, prays that a writ of certiorari issue to review the judgment (R. 103) of the Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on

February 17, 1944, affirming a decision (R. 76) of the Tax Court of the United States.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 95-102) is reported in 141 F. 2d 36 (Advanced Sheets). The opinion of the Tax Court (R. 71-75) is reported in 1 T. C. 798.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 17, 1944 (R. 103). On March 3, 1944, a timely petition for rehearing was filed in that court by petitioner (R. 104) and on March 23, 1944, was denied (R. 106). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 938).

Statement.

This cause relates to federal gift tax liability for the year 1936 determined by respondent for assessment against petitioner as trustee and transferee of property from Hugh McK. Landon, donor. The gift tax liability of Landon relates to the execution by him on July 18, 1936, of a certain written Third Amendment to a trust indenture executed by Landon and petitioner on May 23, 1932, by which amendment Landon cancelled and surrendered the power reserved to him by paragraph 10 of the original trust indenture, to change the trust beneficiaries without making himself a beneficiary.

A timely gift tax return reporting the entire transaction was filed by Landon, but respondent permitted the three

year period of limitation for assessment of tax against the donor to expire without having taken any steps to assess tax to the donor, and respondent then proceeded against petitioner, as trustee and transferee of the trust property. Respondent determined that the execution of such Third Amendment constituted a taxable gift of the value on July 18, 1936, of the property then constituting the trust *res*, and gave notice of such determination to petitioner. On appeal to the Tax Court respondent's determination was upheld by a divided court. Smith and Mellott, JJ., dissented from the Tax Court's opinion but wrote no dissenting opinion. Disney, J., concurred only in the result reached by the opinion.

Virtually all of the facts were stipulated (R. 23-62) before the Tax Court. In addition to the stipulated facts certain other facts were duly proved by the testimony of witnesses.

Landon is a resident of Marion County, Indiana, and is a citizen of the State of Indiana and of the United States of America and has been such resident and citizen continuously since prior to May 23, 1932 (R. 23).

Fletcher Trust Company is an Indiana corporation and is engaged in a general banking and trust business in the City of Indianapolis (R. 23).

On May 23, 1932, Landon, as donor, and Fletcher Trust Company, as trustee, entered into a written trust agreement (R. 24 and R. 33-37). The trust thereby created related to four policies of insurance upon the life of Landon which were concurrently assigned and delivered to petitioner, as trustee (R. 24). The trust agreement required petitioner to hold the policies until their maturity and upon

the donor's death to divide the policy proceeds into three separate trust funds for the benefit of the donor's three daughters, each of whom was given the life income from her respective trust fund. Gifts of the remainder interests were also provided. The trust agreement contained no provision making Landon a beneficiary or giving him control of the trust property, or permitting him or any other person to alter, amend or modify the terms thereof or to rescind the agreement or to revoke or terminate the trusts thereby created, except that by paragraph 10 thereof Landon reserved the right to change any of the beneficiaries of the trust or the terms upon which any beneficiary should receive his share, with the express provision that Landon should not himself become a beneficiary. Paragraph 10 reads:

“10. This trust shall be irrevocable, but Donor, during the period ending thirty days prior to Donor's death, reserves the right to change any of the beneficiaries hereunder or the terms upon which any beneficiary shall receive his share, except that Donor shall not himself become a beneficiary.” (R. 36.)

On September 7, 1935, Landon executed (R. 24) a written “First Amendment” (R. 37-38), amending the original trust agreement of May 23, 1932, and on September 18, 1935, Landon executed (R. 24) a written “Second Amendment” (R. 38-39), further amending the original trust agreement of May 23, 1932. Neither the First Amendment nor the Second Amendment is material to the issues in the case.

On July 18, 1936, Landon executed (R. 25) a written “Third Amendment” (R. 40), further amending the original trust agreement of May 23, 1932, by cancelling and surrendering the power reserved to him by paragraph 10 of the

original trust indenture to change the beneficiaries of the trust without making himself a beneficiary.

On March 15, 1937, Landon filed (R. 25) with the Collector of Internal Revenue at Indianapolis a federal gift tax return (R. 27-41) for the calendar year 1936, in which he fully reported the execution of the Third Amendment of July 18, 1936, and claimed that under the gift tax law and Treasury regulations no taxable gift had been made by the surrender of his reserved power.

On June 4, 1937, petitioner filed (R. 25) with the Collector a "Donee's or Trustee's Information Return of Gifts", Treasury Department Form 710 (R. 41-46).

In June, 1936, Landon caused to be filed (R. 25) with the Collector four Life Insurance Statements, on Treasury Department Form 938 (R. 47-57), setting forth the correct interpolated gift tax values on July 18, 1936, of the four policies of insurance transferred to petitioner at the time of the execution of the original trust agreement. With the filing of such Life Insurance Statements, respondent was given all data and information needed to make final determination of the gift tax deficiency which was later determined by respondent against petitioner and was upheld by the Tax Court and the Circuit Court of Appeals.

On January 18, 1941, respondent mailed to petitioner (R. 26) a notice of a deficiency of gift tax (R. 58-62) determined to be owing by Landon for the year 1936 by reason of the execution of said Third Amendment of July 18, 1936, but to be assessed against petitioner as Trustee and Transferee.

Prior to executing the Third Amendment of July 18, 1936, Landon was advised by counsel that the then existing

Regulations of the Treasury Department relating to the federal gift tax recognized that the cancellation and surrender of the power reserved to him to change beneficiaries without making himself a beneficiary, did not constitute a taxable gift, and acting in reliance on such Regulations Landon executed the Third Amendment (R. 64-67).

During all of the period from March 15, 1937, the date of the filing of Landon's federal gift tax return for 1936, to March 16, 1940, Landon was solvent; he was not rendered insolvent by the execution on July 18, 1936, of the Third Amendment; and he was at all times during that period fully able to pay any amount of federal gift tax liability which might properly have been determined against him in respect to any taxable gift resulting from the execution of the Third Amendment. Neither the original creation of the trust nor the surrender of the reserved power effected by the execution of the Third Amendment was made with the intent on the part of Landon to hinder, delay or defraud his creditors, and neither the creation of the trust nor the surrender of the power was in any other way or for any other reason fraudulent as to his creditors. Petitioner did not assume or agree to pay any liability of any kind whatsoever of Landon, either at the time of the creation of the trust, or at the time of the execution of the Third Amendment, or at any other time (R. 63-64).

Questions Presented.

By their respective opinions both the Circuit Court of Appeals and the Tax Court held that by the execution of the Third Amendment, surrendering his reserved power, Landon, as donor, made a taxable gift; that the beneficiaries of the trust are "donees" and incurred personal liability

for the donor's tax under Section 510 of the Revenue Act of 1932; that such donees are included within the definition of "transferees" contained in Section 526(f) of the Revenue Act of 1932 and are therefore subject to summary procedure provided for the collection of the liability of transferees by Section 526(a)(1) of the Revenue Act of 1932 and to the one-year extended period of limitation on the collection of such transferee liability under Section 526(b)(1) of the Revenue Act of 1932; and that petitioner, as trustee, is liable, to the extent of the trust property, as "fiduciary of transferee", under Section 527(b) of the Revenue Act of 1932, for the transferee liability of the donee-beneficiaries.

The questions presented are:

1. Whether Section 501 of the Revenue Act of 1932 as interpreted by Article 3 of Regulations 79, 1936 edition, adopted February 26, 1936, and in effect on July 18, 1936, imposed gift tax liability on Landon in respect to the execution of the Third Amendment of July 18, 1936, and, if as so interpreted it did not impose such gift tax liability, whether such Article 3 of Regulations 79 is a valid and binding interpretation by which the liability of Landon for gift tax in respect to said Third Amendment is to be determined.
2. Whether the beneficiaries, who are only contingent beneficiaries in expectancy of a spendthrift trust, incurred personal liability as donees for the donor's gift tax under Section 510 of the Revenue Act of 1932.
3. Whether the failure of respondent to send a deficiency notice to the donor, Hugh McK. Landon, as required by Section 513(a)(1) of the Revenue Act of 1932 prevented

respondent from asserting liability against petitioner as trustee or transferee or as fiduciary of a transferee under Section 526 of the Revenue Act of 1932.

4. Whether the collection of the liability of the donee-beneficiaries for gift tax under Section 510 of the Revenue Act of 1932 is barred by the three-year statute of limitations provided by Sec. 517(a) of the Revenue Act of 1932.

5. Whether the statutory liability of a donee for the "tax imposed by this title" under Section 510 is included within the "liability, at law or in equity, of a transferee" enforceable under Section 526 of the Revenue Act of 1932.

6. Whether the requisite notice to the Commissioner referred to in Section 527(b) of the Revenue Act of 1932 was given in this case, thereby bringing into operation the provisions of that section of the Act and subjecting petitioner as fiduciary of transferee to the duties placed on a transferee by Section 526 of the Revenue Act of 1932.

7. Whether petitioner is a fiduciary of a transferee under Section 527(b) of the Revenue Act of 1932 and as such fiduciary is subject to the transferee provisions of Section 526 of the Revenue Act of 1932, including a duty to discharge the liability of Landon for gift tax in respect to the execution of the Third Amendment of July 18, 1936.

Statutes and Regulations Involved.

The pertinent statutes and regulations are reproduced in the Appendix to this petition.

Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Landon's surrender of the reserved power to change beneficiaries of the trust without making

himself a beneficiary constituted a taxable gift under Section 501 of the Revenue Act of 1932, as interpreted by Article 3, Regulations 79 (1936 ed.).

2. In holding that the beneficiaries of the instant trust are donees and as such incurred statutory personal liability for the donor's gift tax under Section 510 of the Revenue Act of 1932.

3. In holding that respondent could proceed against petitioner as fiduciary of a transferee without having sent a deficiency notice to the donor, Landon, as required by Section 513(a)(1) of the Revenue Act of 1932.

4. In holding that the collection of gift tax liability is not barred by the three-year statute of limitations contained in Section 517(a) of the Revenue Act of 1932.

5. In holding that the "liability at law" of a transferee enforceable under Section 526(a) of the Revenue Act of 1932 includes the statutory personal liability placed by Section 510 of that Act on a donee for the "tax imposed by this title".

6. In holding that petitioner is a fiduciary of a transferee under Section 527(b) of the Revenue Act of 1932 and is subject to the duties and liability placed on a transferee by Section 526 of the Revenue Act of 1932.

7. In holding that notice as required by Section 527(b) and (c) and Article 61, Regulations 79 (1936 ed.), was given to respondent, thereby bringing into operation Section 527(b) and subjecting petitioner to the transferee provisions of Section 526 of the Revenue Act of 1932.

8. In affirming the decision of the Tax Court.

9. In denying Petitioner's Petition for Rehearing.

Reasons for Granting the Writ.

1. The decision of the Court below holds invalid Article 3 of Regulations 79 (1936 ed.) as applied prospectively, a question on which this Court withheld its decision in *Rasquin v. Humphreys*, 308 U. S. 54. Its holding is not only in conflict with the administrative interpretation but also with Congressional approval given to such interpretation. On this question depends the existence of liability for federal gift tax in respect to all transactions of the kind here presented from February 26, 1936, the effective date of Article 3 of Regulations 79 (1936 ed.), to January 1, 1939, the effective date of Section 502 of the Revenue Act of 1943. This is an important federal question which has not been, but should be, clearly settled by this Court.

2. The Court below held that a contingent beneficiary in expectancy of a spendthrift gift in trust is a donee and is personally liable for the donor's gift tax under Section 510 of the Revenue Act of 1932. To impose such personal liability on an unwitting person who is only a contingent beneficiary in expectancy of a spendthrift trust from which he has at present received nothing and may never receive anything is not within the true intent of the law and is in contravention of due process of law. This is a most important question of federal law which has not been, but should be, settled by this Court.

3. The Court below failed to apply the absolute requirement made by Section 513(a) of the Revenue Act of 1932 of notice to the donor of any determination of deficiency in gift tax and the prohibition therein contained against collection or assessment of such deficiency without the sending of the required notice to the donor. The donor is

constitutionally entitled to notice of any determination of his federal gift tax liability and to be heard in respect thereto. Section 513(a) guarantees that constitutional right, but the Court below has refused to follow the clear mandate of the law. This is an important federal question which has not been, but should be, settled by this Court.

4. Section 510 of the Revenue Act of 1932 makes a donee liable for "the tax imposed by this title", and Section 517(a) requires the "tax imposed by this title" to be assessed within three years after the filing of the donor's return. The Court below has failed to apply the explicit requirement of Section 517(a) that the "tax imposed by this title" be assessed within the three-year period. The effect of the decision of the Court below is to nullify the obvious legislative intent that the Commissioner shall assess the "tax imposed by this title" within the three-year period, and in all cases to enlarge such assessment period to four years. This is an important federal question which has not been, but should be, decided by this Court.

5. By its decision the Court below has held that the liability of a donee under Section 510 of the Revenue Act of 1932 is included in "liability at law or in equity" of a transferee dealt with by Section 526 of that Act, whereas Section 526 and all other provisions of the Act carefully distinguish between statutory liability for the "tax imposed by this title" and "liability at law or in equity". Properly construed, the Act excludes statutory liability for the "tax imposed by this title" from the "liability at law or in equity" enforceable against a transferee, and therefore does not provide an additional year for assessing statutory liability for the "tax imposed by this title" which Congress

expressly required to be assessed within the three-year period fixed by Section 517(a) of the Act. This is an important federal question which has not been, but should be, settled by this Court.

6. The Court below has held that a trustee presently acting only as a custodian for safekeeping of certain insurance policies, possessing only limited powers commensurate with its status as custodian and having no property from which to pay an asserted gift tax liability, is a trustee of a transferee within the purview of Section 527(b) of the Revenue Act of 1932 and must assume all of the powers, rights, duties and privileges of a transferee, an onerous and arbitrarily imposed burden which such trustee is not qualified or equipped to assume. This is a misinterpretation of the true intent of the law and presents a serious problem to all fiduciaries of gifts in trust. It is an important federal question which has not been, but should be, decided by this Court.

7. The Court below failed to give effect to the express condition and requirement made by Section 527(b) of the Revenue Act of 1932 of notice to the Commissioner and to the requirement made by Section 527(c) that such notice shall be given in accord with regulations prescribed by the Commissioner, and failed to give effect to Article 61 of Regulations 79 (1936 ed.) specifying the exact character and contents of the notice required to bring Section 527(b) into operation. The effect of the decision of the Court below is to permit any kind of notice or information received by the Commissioner of the existence of a fiduciary relationship to be the basis for imposing all of the powers, rights, duties and privileges of a transferee on an unsuspecting trustee neither prepared nor equipped to assume

such burden. This is an important federal question which has not been, but should be, settled by this Court.

Respectfully submitted,

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